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Richard Madsen and Nancy Madsen, his wife, for themselves and all others similarly situated v. Prudential Federal Savings and Loan Assoiation : Brief of Appellant

Utah Supreme Court

IN THE UTAH STATE SUPREME COURT

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated, Appellants, vs. PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, Respondent.	Case No.860148 Category No. 10

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ISSUE PRESENTED FOR REVIEW

Did the presiding judge of the Third Judicial District err by disqualifying Judge Rigtrup after a trial on the merits.

RELIEF SOUGHT ON APPEAL

Appellant prays this Court to vacate the order of the trial court by which Judge Rigtrup was disqualified, and to remand the case to Judge Rigtrup for further proceedings.

STATEMENT OF THE CASE

Madsen entered into a home loan with Prudential. The trust deed contract required Madsen to pay funds into an escrow account. Madsen claimed that he was entitled to interest or earnings on the escrowed funds. The case was brought as a class action.

The case is nearly twelve years old. After exhaustive litigation, including two appellate decisions,[1] the case was finally tried on the merits before the Honorable Kenneth Rigtrup.

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[1] Madsen v. Prudential Savings & Loan, 558 P.2d 1337 (Utah 1977); Madsen v. Prudential Savings & Loan, 635 F.2d 797 (10th Cir. 1980).

Near the end of the trial (but prior to any ruling), Judge Rigtrup remarked that he had once financed a home through Prudential. (Exhibit A at p. 494.) Judge Rigtrup reminded counsel that he had disclosed that relationship early in the case. (Exhibit A at p.495.)

Prudential's attorney replied that he could not recall the earlier disclosures. (Exhibit A at pp.494-497.) Nevertheless, Prudential did not object to Judge Rigtrup continuing on the case. Nor did Prudential seek a continuance.

Therefore, Judge Rigtrup proceeded with the trial and made a bench ruling against Prudential in the sum of $134.70[2] (Exhibit A at p.507.) Prudential waited thirty-nine days <u>after</u> the ruling before filing a motion to disqualify Judge Rigtrup. (R. 99.) Prudential further moved to void all of Judge Rigtrup's prior rulings.

The disqualification motion was heard by Judge Fishler (presiding judge). Judge Fishler granted the motion and vacated all prior rulings of Judge Rigtrup including the trial. (Exhibits B and C.)

---

[2]This verdict involves only the named plaintiff Richard Madsen. Further, proceedings on the class aspects of the case were reserved.

SUMMARY OF ARGUMENTS

The sole basis for disqualification in this case was an "appearance of bias". In fact the trial court made a specific finding that there was no actual bias. However there is no statutory authority to disqualify a judge without a specific finding of actual bias.

An "appearance of bias" might constitute a violation of the Code of Judicial Conduct. However, if a judge violates the Code, the judge should be penalized. Here the plaintiff was penalized, and no action was taken against the judge.

At most, Judge Rigtrup had a remote, contingent, and speculative interest of about $134 in this case. A recent decision of the U.S. Supreme Court has squarely ruled that judges need not be disqualified for such speculative trivia.

Finally, Prudential failed to make a timely objection to Judge Rigtrup. Rather, the judge's decision was announced, over a month before Prudential got around to objecting. Thus, any error was waived.

POINT I

JUDGE RIGTRUP'S INTEREST IN THIS CASE IS REMOTE, SPECULATIVE, AND TRIVIAL

A. Judge Rigtrup is Not a Member of the Existing Class.

This case was certified as a class action years ago by Judge Croft. (See Exhibit D.) It is important to emphasize that Judge Rigtrup is not a member of that existing class. Indeed, the trial court has made a specific

finding that Judge Rigtrup is not a party in this case. (Ex. C.)

It is true that Judge Rigtrup did have a home loan with Prudential. However, discovery has shown that Prudential uses several different contract forms. (R. 15 to 38.) Judge Rigtrup's contract was completely different. (Exhibit E.) Thus, Judge Rigtrup is not a member of the existing class.[3]

Since Judge Rigtrup is not a member of the existing class, he has no direct interest in this case.

B. Judge Rigtrup Has Ruled That He Will Not Be a Part of Any Future Enlarged Class.

After the class was originally certified, Madsen amended the complaint (R. 59 to 86.) The amended complaint added new theories and sought to enlarge the class.

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[3] The Trust Deed For The Certified Class (Exhibit D)

> [T]he trustor agrees to pay to the beneficiary, upon the same day each month, budget payments estimated to equal one-twelfth of the annual taxes and insurance premiums . . . and said budget payments are hereby pledged to the beneficiary as additional security for the full performance of this deed of trust and the note secured thereby. The budget payments so accumulated may be withdrawn by the beneficiary for the payment of taxes or insurance premiums due on the premises.

[3] The Rigtrup Trust Deed (Exhibit E)

> . . . [T]he Mortgagor will pay to the mortgagee, on the first day of each month . . . the premiums that will next become due and payable on policies of fire and other hazard insurance covering the mortgaged property, plus taxes and assessments next due on the mortgaged property . . . such sums to be held by mortgagee in trust to pay the ground rents, premiums, taxes and assessments before the same become delinquent.

Under the amended complaint all customers of Prudential would have become class members. Obviously, Judge Rigtrup would have been a member of that enlarged class.

However, the amended complaint only set forth a potential class. The class would have no existence unless certified. Rule 23(c)(1) U.R.C.P. states:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained.

Plaintiff did make a motion to certify the new class. (R. 87.) If the new class had been certified, Judge Rigtrup would have become a member of that new class. However, Judge Rigtrup denied the motion to certify the new class. (R. 90.)[4]

In summary, Judge Rigtrup was a potential class member, but he squarely ruled that the enlarged potential class would not come into existence.[5]

---

[4]The motion is sometimes referred to as a motion to add a defendant class. However, in substance the motion sought to add a defendant class, and to substantially enlarge the plaintiff class. The new enlarged plaintiff class would (if certified) have included Judge Rigtrup.

[5]It is difficult to see how there could be an "appearance of bias" in this case when Judge Rigtrup ruled against his own interest in this matter.

C. Judge Rigtrup Can Never Bring an Individual Claim.

We have demonstrated in paragraph A and B, above, that Judge Rigtrup was not a member of any existing or potential class of plaintiffs in this case. Indeed, the sole basis for disqualification was that a new individual lawsuit might be brought in the future, and that Judge Rigtrup might benefit from that future lawsuit. Specifically, the lower Court stated:

> . . . [I]t is conceivable that his [Judge Rigtrup] rulings could be binding upon Prudential in other similar litigation in which Judge Rigtrup could be a plaintiff on a theory of collateral estoppel.

(Exhibit B at P.3 and 4.)

In theory, Judge Rigtrup might have filed his own individual lawsuit against Prudential. However, any independent claim which Judge Rigtrup might have had is squarely barred by the statute of limitations.[6] §7-17-9(2) Utah Code Annotated.[7]

In short, Judge Rigtrup has no present interest in this case; no future interest in this case; and not even any theoretical interest in this case.

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[6]The Rigtrup mortgage was paid off in December of 1983 which was apparently before Judge Rigtrup was ever assigned to sit on this case. (R. 203.)

[7]"No action seeking payment of interest on or other compensation for use of the funds in any reserve account for any period prior to July 1, 1979 shall be brought after June 30, 1981".

POINT II

THE DISQUALIFICATION WAS BASED SOLELY ON AN ALLEGED VIOLATION OF THE CODE OF JUDICIAL CONDUCT

The grounds for disqualifying a judge are found in Article VIII, §13 of the Utah Constitution, (Exhibit F) §78-7-1 of the Utah Code Ann., (Exhibit G) and Rule 63 of the Utah Rules of Civil Procedure. (Exhibit H.)

Rule 63, U.R.C.P. states that "Whenever a party . . . shall make and file an affidavit that the Judge . . . has a bias or prejudice . . . such judge shall proceed no further therein . . ." (Emphasis added.) Accordingly, it has always been the law in Utah that a disqualification must be based upon an actual bias. See Haslam v. Morrison, 113 Ut.14, 190 P.520 (1948).

However, the trial court made a specific finding that there was no actual bias:

> . . . [A]ll prior rulings of Judge Rigtrup be and the same are hereby set aside on the ground and for the reason that although there is no actual bias on the part of Judge Rigtrup, there is an appearance of bias. (Exhibit C.)

Rather, the trial court based disqualification squarely on an "appearance of bias" under the Code of Judicial Conduct. The trial court stated:

> More importantly, in 1974 the Utah Supreme Court approved the Code of Judicial Conduct. Canon 3(c) provides that a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned. This court concludes that the impartiality of Judge Rigtrup might be reasonably questioned, and therefore Judge Rigtrup should have disqualified himself . . . (Ex.B at p.3.)

POINT III

THERE WAS NO VIOLATION OF THE CODE OF JUDICIAL CONDUCT

Madsen does not concede that the Code of Judicial Conduct is applicable in this case. (See Point IV below.) However, if the Code of Judicial Conduct is applicable, the trial court erred by failing to give effect to the entire code. (See Exhibit K.)

Specifically, the trial court relied on Canon 3C which states:

> A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . .

However, the trial court erred, as a matter of law, by failing to give effect to other related sections of the Code. Section 3C(1)(c) further clarifies that an appearance of bias arises when:

> [H]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy . . . that could be substantively affected by the outcome of the proceeding: [Emphasis added.]

Thereafter, Section 3(C)(3)(c) explains that:

> "financial interest" means ownership of a legal or equitable interest, however, small . . . except that . . . (iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings assn. or similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceedings could substantially affect the value of the interest . . . [Emphasis added.]

In this case, the named plaintiff, Madsen, won a judgment of approximately $134. If Judge Rigtrup had some theoretical claim, it would probably be in that same range.

It is not likely that Judge Rigtrup would sell his soul--or his good reputation for $134. Furthermore, the Code of Judicial Conduct clearly excludes such trivia. The United States Supreme Court has ruled squarely on this issue. On April 22, 1986, the U.S. Supreme Court decided Aetna Ins. Co. v. LaVoie, 106 S.Ct. 1580 (1986). The LaVoie case is attached as Exhibit L. In LaVoie, the appellant sought to disqualify Justice Embry of the Alabama Supreme Court. The claim against Justice Embry was that he had already filed a personal lawsuit virtually identical to the suit at bar. The U.S. Supreme Court disqualified Justice Embry. The Court reasoned:

> We hold simply that when Justice Embry made that judgment, he acted as "a judge in his own case."

106 S. Ct. at 1586.

Appellant further sought to disqualify the entire Alabama Supreme Court. Appellant claimed that members of the Court were potential members of a class action which would be affected by the ruling. On that issue, the U.S. Supreme Court ruled that:

> . . . [W]hile these justices might conceivably have had a slight pecuniary interest, we find it impossible to characterize that interest as "direct, personal, substantial, [and] pecuniary" [Citations omitted] . . . Any interest that they might have had when they passed on the rehearing motion was

> clearly highly speculative and contingent . . . With the proliferation of class actions involving broadly defined classes, the application of a constitutional requirement of disqualification must be carefully limited. [Citation omitted.]

106 S.Ct. at 1588.

The ink is still wet on LaVoie. Moreover LaVoie is squarely in point. Finally, LaVoie makes good sense. There is just no reason to disqualify a judge who has some contingent speculative interest in a case involving only $134. The public is entitled to have respect for its judges. But the public is not so gullible as to believe that judges sell out for the prospect of maybe someday getting $134.

POINT IV

THE TRIAL COURT PUNISHED THE WRONG PARTY FOR THE ALLEGED VIOLATION OF THE CODE OF JUDICIAL CONDUCT

If Judge Rigtrup violated an ethical canon, he should be punished. Canon 3B(3) of the Code of Judicial Conduct states that:

> A Judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. [Emphasis added.]

Indeed, Article VIII, Section 13 of the Utah Constitution (Exhibit F) sets up the procedure for disciplining a judge.

In this case Judge Rigtrup was not punished at all. Rather, the court imposed a drastic financial penalty on a wholly innocent party--the plaintiffs. It will be expensive to redo years of Judge Rigtrup's work. Indeed, plaintiff's expert witness fees were over $20,000 before the trial even started (R. 347.)

In summary, the alleged wrongdoer (Judge Rigtrup) gets off "scott free." On the other hand, an innocent party (plaintiff) is severely penalized in time and money for Judge Rigtrup's alleged faults.

This court should rule, as a matter of law, that innocent parties should not be penalized when a judge violates his ethical duties.

POINT V

THE ERROR, IF ANY, WAS WAIVED

Judge Rigtrup claims that he had disclosed any potential bias several years ago. There is some conflict over whether or not Judge Rigtrup did make that early disclosure. (See Statement of the Case.)

However, there is no dispute that Judge Rigtrup did disclose any potential bias at trial and before any decision was announced. (See generally Exhibit A.)

When Judge Rigtrup announced the potential bias at trial, Prudential waited to see who would win. Then thirty-nine days after the trial, Prudential finally filed its motion to disqualify Judge Rigtrup.

Plaintiff has located no case in history (in the U.S. or elsewhere) where a party, knowing of the grounds for disqualification, could gamble on the outcome of a case and then have the judge disqualified after the decision.

Rather, the law is that a party, having knowledge of facts, that would be grounds for disqualification, must assert his objection before the judge rules on the merits of the case; e.g., Carpenter v. State, 575 P.2d 26 (Kan., 1978); Jones v. Stivers, 447 S.W.2d 869 (Ky., 1969); In Re: United Shoe Machinery, 276 F.2d 77 (1st Cir., 1960); Keating v. Superior Court, 289 P.2d 209 (Cal. 1955); Aker v. Coleman, 88 P.2d 869 (Id., 1939); State et. rel. Shufeldt v. Armigo, 50 P.2d 852 (New Mex., 1935); Rademacher v. City of Phoenix, 442 F. Supp. 27 (D. Ariz., 1977); Williams Mauseth Insurance Brokers, Inc., v. Chapple, 524 P.2d 431 (Wash. App. 1974).

Here are some typical examples of the Rule:

> A litigant who for the first time during trial learns of grounds for disqualification must promptly make his objection known as by moving for a mistrial . . . He may not, after learning of the grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified.
> Williams Mauseth Insurance Brokers, Inc. v. Chapple, 524 P.2d 431, 434 (Wash. App. 1974).

* * * *

> One may not gamble on a favorable ruling and then move for disqualification upon receiving an adverse order.
> Lagies v. Copley, 110 Ca. App. 3d 958, 966, 168 Cal. Rptr. 368, 372 (1980).

* * * *

> A party "is not permitted to wait until he sees which way the decision is going before deciding whether to stay with or try to eliminate the judge."
> West v. Superior Court, 448 P.2d 57 (Ariz. 1968).

POINT VI

PRUDENTIAL HAD AN ADEQUATE OPPORTUNITY TO MAKE A TIMELY OBJECTION

We have noted, above, that Prudential waited thirty-nine days before objecting to Judge Rigtrup sitting on the case. On that subject the trial court ruled that:

> In reviewing the transcript, this court concludes that counsel for the defendant could not be expected to interrupt the proceedings to file an affidavit of prejudice. (R. 239.)

Nothing could be further from the truth. A fair reading of the transcript (Exhibit A) shows that Judge Rigtrup conducted the hearing with great dignity and courtesy. Prudential's counsel was in no sense cut off. Specifically, Prudential's counsel addressed the court on ~~eleven~~ Thirteen separate occasions during the closing minutes of the hearing. (See Exhibit A.) On any of those eleven occasions, Prudential merely had to say, "we object". Indeed, at the end of the hearing, Judge Rigtrup stated: "Do you desire to take any further exceptions to my openness and candor?" (See Exhibit A at p. 509.) Despite that invitation, Prudential remained silent!

What the record shows is simply that Prudential decided to "wait and see" what the ruling was. Indeed, Prudential's counsel agreed that Judge Rigtrup could proceed:

> MR. PALMER: No prejudice arose in the court's mind because of the fact that we collected a mortgage escrow from you?
>
> THE COURT: No.
>
> MR. PALMER: Okay. I can't do anything else but ask.

(Exhibit A at pp.496 and 497.)

Of course Prudential could have done something else. Prudential could have used the magic words: "we object."

This is not a case where the trial court weighed conflicting evidence. The trial transcript is before the court. There is simply no evidence that the Judge somehow interfered with Prudential's counsel.

POINT VII

PRUDENTIAL HAD AN ADEQUATE OPPORTUNITY TO CONSULT WITH ITS CLIENT REGARDING DISQUALIFICATION

Prudential's next excuse for the thirty-nine day delay was that counsel had to confer with the client. The trial court bought that argument hook, line and sinker. The court ruled:

> . . . when Judge Rigtrup made his statements about being a former borrower of Prudential . . . insufficient notice was given to Prudential's counsel of the fact to allow counsel to confer with his client to determine the appropriate course of action. (R. 239.)

The argument is frivolous. The appropriate procedure would have been to move for a continuance; prepare the necessary paperwork; and file the papers prior to receiving the ruling. Rather, Prudential wanted to gamble on a favorable ruling--and decide on disqualification later.

Moreover, Prudential's executive vice president was in the courtroom at all times. (See Exhibit I.) Counsel could have consulted with him during a break.

POINT VIII

THE TRIAL COURT ERRED BY FAILING TO APPLY THE CORRECT BURDEN OF PROOF

In each of the prior points, it has been assumed, arguendo, that Judge Rigtrup did not disclose his relationship with Prudential before the trial. However, there is substantial evidence in the Record that Judge Rigtrup did, in fact, disclose that relationship years earlier.

To begin with, Judge Rigtrup testified that:

> THE COURT: As I've indicated earlier, and no objection was interposed, I was a customer of Prudential Federal Savings and Loan Association and paid without default for 25 years at four and three-quarters percent, and I knew that was such a fine deal that my wife couldn't get me to remodel or move or anything because I was 23 years old when I first took the mortgage out, and I computed that out and I thought, why, those robbers, they are charging me twice what I'm borrowing from them, and that's unfair. As I got older and more sophisticated, I--

> MR. PALMER: Your Honor, I hate to interrupt, but I need to make the point that this is news to me, that you had been a customer of Prudential.
>
> THE COURT: I indicated that on several occasions.
>
> MR. PALMER: I beg the Court's pardon, but that is news to me. I don't recall that at all--if anybody else does--recall telling me that, and I--
>
> THE COURT: I indicated that in these earlier meetings that I had paid my loan off at some point and I'd had a loan with Prudential Federal Savings.

(Exhibit A at pp.494 and 495.)

Before the decision was announced, counsel for Madsen testified:

> MR. DEBRY: I do recall some conversation, I think, off the record, of that effect, and I honestly don't recall who was present. But it was a comment that was made from time to time.

(Exhibit A at p.495.)

In addition, counsel for Prudential testified that:

> I remember Judge Rigtrup disclosed in chambers, with other counsel present and approximately two years ago, that he had a mortgage with a reserve account, but he[8] did not say it was with Prudential.

(R. 117.)

---

[8]It should be remembered that plaintiff had already alleged a new defendant class of all lenders in Utah. Thus it must have been apparent that Judge Rigtrup was a potential party--or a potential member of that larger class. (See Point IB, above.) Nevertheless, no one objected.

At least one other disinterested party has testified:

> I recall that at some point in the proceedings over which he presided, Judge Rigtrup indicated that he had an old, low-interest mortgage loan which contained a reserve account clause. He further ruled that he would be able to rule objectively in these matters despite that fact. I recall that he asked if anyone had any objections to his sitting on these cases. I do not recall anyone so objecting. (Exhibit J.)

Faced with this testimony, Judge Fishler said he simply couldn't make up his mind:

> I am going to find that neither party has established any preponderance of evidence that Judge Rigtrup either disclosed or did not disclose any interest that he might have had. (R. 804-805.)
>
> * * * *
>
> I think the next issue has got to be the timeliness issue, and I'm going to rule now that to me the evidence is evenly balanced as to whether or not there was a disclosure. (R. 864.)

In its final order, the trial court allocated the burden on Madsen. Thus the evidence was evenly balanced; but since Madsen had the burden, Madsen lost:

> The Court has reviewed the Affidavits on file, which are conflicting. A remittal of disqualification is in effect an affirmative defense to the Motion to Disqualify a sitting judge. In reviewing the record, the Court can find nothing which persuades it by a preponderance of the evidence that there was a remittal of the disqualification. (Exhibit B at p.4.)

However, the law is to the contrary. A judge is presumed to be fair and to conduct proceedings with impartiality. One who challenges the regularity of the court's proceedings has the burden of proof. See In Re: International Business Machines Corp., 618 F.2d 923, 932 & 934 (2nd Cir. 1980); In Re: Union Leader Corp., 292 F.2d 381, 389 (1st Cir. 1961); Matter of Estate of Baird, 406 N.E.2d 1323, 1331 (Ind. App. 1980); Mayo v. Beber, 2 Cal. Rptr. 405, 409 (1960); Bass v. Minich, 109 S.W.2d 139, 140 (Ark. 1937).

In summary, the trial court placed the burden of proof on the wrong party.

POINT IX

IF JUDGE RIGTRUP IS DISQUALIFIED, THAT SHOULD NOT VOID ALL OF HIS PRIOR RULINGS

After the trial, the Court issued its ruling from the bench. However, before the formal findings of fact were signed, Prudential filed its motion to disqualify Judge Rigtrup.

If Judge Rigtrup is disqualified, the parties need not be put to the expense of a new trial. It should be sufficient for a new judge to take over after the findings of fact have been entered.

> It is the general rule that the judicial act of a disqualified judge is voidable but not void . . . According to the weight of authority, at Common Law, the

> acts of a disqualified judge are not nullities; they are simply erroneous and liable to be avoided or reversed on proper application, although they cannot be impeached collaterally . . .
> 46 Am. Jur. 2d, Judges, §231.
>
> * * * *
>
> Disqualification from presiding over a particular case does not disqualify the Judge from otherwise holding the part of term which is occupied by the trial . . . or from ruling on those matters under submission.
> 156 C.J.S. Judges.

In addition, Madsen relies on the case of Coastal Petroleum Co. v. Mobile Oil Corp., 378 So.2d 336 (Fla. App. 1980). That case is very similar to the Madsen case. In Coastal, the judge heard the trial, and announced the substance of his rulings. Thereafter, motions were made for recusal. The judge did recuse himself from hearing additional matters not yet tried. However the judge reserved jurisdiction to enter a final ruling on the matters already tried and under submission. The appellate court upheld the ruling. See also Martys Floor Covering v. GAF Corp., 604 F.2d 266 (4th Cir. 1979). "Only prospective relief is afforded by this section. It cannot be used as a means of obtaining a new trial."

CONCLUSION

It is absolutely true that the public should be protected from biased judges. But it is equally true, that the public should be protected from judge-shopping. Indeed our statutes provide:

> If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court.
> Utah Code Annotated, §78-7-19.

Prudential's attempt to disqualify Judge Rigtrup after losing the case is thinly veiled attempt to violate §78-7-19.

DATED this ____ day of _____, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

By: _____

CERTIFICATE OF MAILING

I hereby certify that on the 19 day of November, 1986, I mailed a true photocopy of the foregoing Brief of Appellant (Madsen vs. Prudential), postage prepaid, to the following:

Joseph J. Palmer
Reid E. Lewis
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111

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FABIAN & CLENDENIN
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ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oo0oo-

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated, Plaintiffs,	]	
vs.	]	Civil No. 226073
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, for itself and all others similarly situated, Defendants.	]	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

September 6, 1985

BEFORE THE HONORABLE KENNETH RIGTRUP
District Court Judge
[Sitting Without a Jury]

A P P E A R A N C E S:

For the Plaintiffs: Robert J. DeBry
Robert J. DeBr & Assoc.
965 East 4800 South, No. 2
Salt Lake City, Utah

For the Defendants: Joseph J. Palmer
Reid E. Lewis
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111

GAYLE B. CAMPBELL
CERTIFIED SHORTHAND REPORTER

the convenience of the record for closings?

MR. DeBRY: We are prepared to proceed with closing at the convenience of the Court. If it's getting late --

THE COURT: I'm just talking about the record.

MR. DeBRY: Oh, we don't need a reporter.

MR. PALMER: You mean for closing arguments? Oh, I think it should be reported, your Honor.

THE COURT: Very well.

[Whereupon, closing arguments were presented to the Court by respective counsel.]

THE COURT: I had thought earlier that I might go home and spend some time with the case, but I've decided that I'd rather let you gentlemen twist and turn for the weekend rather than me. So I'll share the benefits of my decision with you at this point.

The difficultyof the case is not because of the battle of the experts, and I think I've got some valuable training in that at the Public Service Commission. I suppose that has a personal flavor, because I respect both of these gentlemen. I like both of them. And the difficulty is that they react like former fellow Public Service commissioners, they will take my opinion or my ruling or my view as a personal affront to them, maybe.

And that's certainly unfortunate. That's not why the case is a problem to the Court. I have had incremental kinds of suffering for four years in that these two lawyers have tested me, they have twisted me and they have pulled and tugged me and jerked and proposed every conceivable concept that you could come up with, and the substance -- I'll expose my biases and my prejudices and be very frank with you.

I think there are some substantial kinds of policy things that have really caused me great trouble and trauma. As I've indicated earlier, and no objection was interposed, I was a customer of Prudential Federal Savings & Loan Association and paid without default for 25 years at four and three-quarters per cent, and I knew that was such a fine deal that my wife couldn't get to remodel or move or anything because I was 23years old when I first took the mortgage out, and I computed that out and I thought, why, those robbers, they are charging me twice what I'm borrowing from them, and that's unfair.

As I get older and more sophisticated I --

MR. PALMER: Your Honor, I hate to interrupt, but I need to make the point that this is news to me, that you had been a customer of Prudential.

THE COURT: I indicated that on several occasions.

MR. PALMER: I beg the Court's pardon, but that is news to me. I don't recall that at all -- if anybody else does -- recall you telling me that, and I --

THE COURT: I indicated that in these earlier meetings that I had paid my loan off at some point, and I'd had a loan with Prudential Federal Savings.

MR. PALMER: Perhaps the Court is thinking of conferences with other counsel. The reason I make the point is --

THE COURT: My earlier conferences were not with the two of you in this case, they were with Mr. Billings, with Mr. Ashton, with you, with Mr. Giauque, Mr. McDonough, with respect to whoever he represents. It was Mr. Giauque or someone from that office. They were a corrective kind of a deal.

MR. PALMER: In any event, I stand to raise the point now that it is news to us. I believe it -- I take it that the Court did not feel that it had any prejudice because of that.

THE COURT: No.

MR. PALMER: All right.

THE COURT: I have a recollection that somewhere along the line I did make that disclosure. I don't know how you could be part of the community and

be a homeowner and not have borrowed from someone. And so I think I make it very clear in one of those collective kinds of meetings that my loan had been with Prudential Federal.

At any rate, it's a fact, and it was something that I never tried to hide or have hid from anyone. So there's no sense of covering up. I guess if that creates error, it creates error. But so be it. I have a recollection that I did expose it, and whether you were there or Mr. Lewis or anyone else, I don't know. I did make the disclosure early on.

MR. DeBRY: I do recall some converstions, I think, off the record, of that effect, and I honestly don't recall who was present. But it was a comment that was made from time to time.

MR. PALMER: Could I inquire of the Court when the loan was paid off?

THE COURT: Probably two years ago. I'm not sure at what pint in the discussions I indicated that, but I'm sure that in the presence of the collective group that I indicated that I had been a borrower of Prudential Federal Savings.

MR. PALMER: No prejudice arose in the Court's mind because of the fact that we collected a mortgage escrow from you?

THE COURT: No.

MR. PALMER: Okay. I can't do anything else but ask.

THE COURT: That's what I've been trying to tell you. That was the intention.

MR. PALMER: I make the point because I didn't want to go on and let the Court note --

THE COURT: I think I've made general comments throughout that I have cussed financial institutions, and customers do simply because they see inherent injustice about that. And my perspective today, after 23 years has passed, has become much, much different at the end of the 23 years. Far before that I could see the cost of money was markedly greater, and that I would be a damn fool to prepay. So I paid faithfully every month for 25 years, and not a day sooner or a day later. And I'm just commenting generally in terms of unjust or whatever. The tension is between that to be gained and that to be lost, I suppose, in my eyes. And I have a feeling that class actions are a form of champerty in maintenance in that the one that substantially gains is the lawyer or the expert. Mr. Madsen stands to gain little, except he has struck a blow for freedom, I suppose, in the form that the consumer has achieved balance.

Be seated, Mr. DeBry.

MR. DeBRY: I want to make an objection on the record. I really must.

THE COURT: Well, sit down.

MR. DeBRY: Before you give your decision, I must make a comment, because I know the Court is being candid and this has been a long struggle, and Prudential says they are almost broke before this. And you say maybe DeBry will make some money, but I haven't yet. But I really must interpose an objection at this point. If the Court harbors this type of personal bias with respect to --

THE COURT: I'm just --

MR. DeBRY: -- class actions.

THE COURT: I'm just telling you about the tension.

MR. DeBRY: I must object to the Court's sitting on this case if you have that kind of bias.

THE COURT: I'm just telling you why I'm getting to my ruling and how I'm getting to my ruling and being open and candid with both of you. But that's a built-in problem with class actions. They have achieved a beneficial result. The difficult I am locked into is that I have got to follow the law of the case. I have got the Supreme Court that's telling me what to do. I have got a prior trial judge that's told me what to do

as well, and the law is clear that I have got to do what Judge Croft told me to do, because he has ruled on the issue. I have got to do what the Supreme Court ahs told me to do, because they have ruled on the issue. And independent of what my personal thoughts or beliefs are, I'm caught in a catch 22, and there is a realistic tension in that process.

The tension is that in terms of the magnitude of the wear, what is to be gained by Mr. Madsen is de minimis. On the other hand, if the Court looks at economic realities, the high cost of money, high cost of labor and high cost of everything else, there is a societal interest in maintaining healthy, vital financial institutions that have the ability to fund building construction, homes, and so forth, in our community. And I simply observe that probably the savings and loan associations have been very instrumental and important in that particular process. I simply make those as an overview statement sayto what has troubled me, and it's trouble me for a long time.

That's why I have invited you two to sit down and strike a settlement, rather than impress that heavy burden upon me.

Sit down, Mr. DeBry.

MR. DeBRY: Your Honor --

THE COURT: You can take exceptions after I get done. I'm trying to --

MR. DeBRY: I might note that I do have an exception to take at this time before you give your verdict in this matter.

THE COURT: I haven't given a verdict.

MR. DeBRY: With respect to class actions.

THE COURT: I understand. That's where the tension lies. And it's a troublesome decision. It's bothered me for a long time.

This is basically a contract case. It's a contract that was executed by people in Utah, to be performed in Utah. It's not a federal case. It's not a federal regulation case. The federal courts sent it back to Utah to be resolved in the Utah courts. My predecessor, Judge Croft, certified it as a class action. I'm not the appellate court. I can't reverse Judge Croft and until the Supreme Court corrects that as an error, if it is, it's a class action. It has been certified and it is the function of this case as I ruled, and as I think I'm compelled to rule, that as the Supreme Court said, as a matter of contract law, the language contained in the contract in question created a pledge, and that based upon that pledge, Mr. Madsen and his wife were entitled to an accounting for profits made, and were

entitled, at minimum, to an offset against their indebtedness, or I'd assume it would follow, a disgorgement of those profits.

I view that as the law of the case, and inescapable. I also don't view this, even though cast in the context of unjust enrichment, it gives me the prerogative of trying the case based upon just and unjust in terms of enrichment.

The Supreme Court says that the Madsens are entitled to an accounting for profits, so that is what I think I am obliged to follow. I'm not troubled at all by burden of proof. As far as I see day in and day out, the concept was told over and over and over to me as a lawyer, as I practiced in these courts, by D. Frank Wilkins in his rule, which was "He who alleges, must prove."

That is the basic fundamental rule in this case. And the Court, given those limitations and restrictions, had been tortured in terms of the decisional process in this matter. Whether one becomes an expert or one does not, it's not a requirement or prerequisite that you abandon common sense. Mr. Norman knows that I graduated in accounting. So I do have some background.

I think too much, at times, is made of the fact that it almost rises to a point of science rather

than an art, though you use the term art. And I guess the best common sense example of why I perceive there is some overkill in the area is that I was a farm boy, and farmers, with the corner of their shopping bag and a lead pencil, could do more in 15 minutes grappling with weather, grappling with soil conditions, grappling with fertilizing problems, grappling with a choice of seeds and all that they have to program in, and still persist in that activity day in and day out. And that's something which seems to me could confound enough cost accountants to circle the globe. It's not a science, it's an exercise in judgment.

And it seems to me that if the conclusions that are followed by the cost accounting approach are followed, management would have failed a long time ago. The funds are and have been of benefit to Prudential Federal Savings & Loan over the years. They provide a base over which to spread costs. They provide a hedge against default, and provide security.

I realize there are some federal regulations about that, though Prudential, as did other savings and loans, banks, and other institutions, followed the state statute in terms of turning that practice around. And as I recall, part of the regulation provided that state law could be files. But if in the last years when costs,

as you indicated, Mr. Norman, went up enormously -- as they did -- Prudential Federal, if it really strictly followed that analysis, would have somehow found a lower cost alternative rather than keep a loss leader. I give them more credit than that.

There were certainly triple A accounts that weren't collection problems in those accounts. And as to those, I would submit that they would have found some sort of service bureau, or whatever, to perform that function. The generation of deposits, the generation of loans are essential productive features of their bueiness. The function of escrow accounts is a nonessential function, other than as they perceive it to be essential by virtue of federal regulations. And the process of billing, receiving payments, and many of those other things is not greatly different,with or without escrow accounts.

The Court is persuaded of that clearly and convincingly by a preponderance of the evidence. It follows as night the day.

I had experience as a young lawyer, going out and opening an office, of doing a lot of collection work. You do get established, and one lawyer and one good secretary can push an awful lot of volume and paper, and that was before word processing and the fine things

that lawyers have today. We understood that there ere lithographs and other ways to maybe accomplish these things in a less efficient way, but nonetheless, you learn in a short time how to handle great volumes of paperwork with a very small amount of people.

I'm convinced in a very persuasive way that the function of servicing escrow accounts is not a monumental task, and that it can be achieved by a relatively small amount of people. Once you shift from an escrow environment to a nonescrow environment, many of the functions that are performed in that department aren't going to be greatly diminished. They are going to keep the building, they are going to keep the data processing capabilities, and I'm really persuaded by Mr. Stewart's analysis that if you have an appropriate allocation, it more common-sensically follows that those costs be attributed to the productive aspects of the business.

It does not appear to be rational at all, as per Exhibit 8, that costs would escalate in that fashion and they would still maintain that function without making some big corrections.

I think Mr. Norman and Mr. Stewart would both recognize the judgment aspect of any allocation process, and I think they would both recognize that they neither one may have the perfect solution or all of the

answers.

I think they both would be candid, and I respect them for both being honest and upfront. If the computerized and mechanization process added such a heavy burden to the cost, it would have been a better management decision to persist with shoe boxes and a mechanical process, rather than allowing the costs to double in a short period of time when the benefit to be gained was as minimal as it was.

I think, moreover, Mr. Stewart's analysis of the escrow account balances were, as I recall, in the range of 20 per cent lower. I don't know whether that's more accurate or less accurate than your analysis, Mr. Norman, except that it demonstrates a conservative bias in favor of Prudential Federal rather than Mr. Madsen.

There was something said about working capital, that it also seems to me there is -- I think it's maybe unrealistic and idealistic to think that there is instantaneous management of those funds, and there may be a little bias in the analysis of Mr. Stewart, and there is some justification of working capital slack. Moreover, given the high interest rates and the levels we're talking about, management doesn't let large amounts of uninvested funds go for 60 days, and they are moving them into a mode of investment where they can derive

daily yield-kind of investments at times to keep the funds working. As for the assignment of a lot of costs, I'm impressed that the building is a sunk cost, and the assignment of a large amount of that really doesn't track the function.

I'm convinced that advertising to generate the productive aspect of the business; namely, loans and deposits, doesn't have as part of its function to generate escrow business. They are not in the business, really, of providing escrow business as a primary function. And I think the bulk of the high level management decisions really aren't involved in managing day-to-day escrow decisions. It seems to the Court that most of that is clerical and doesn't require the highest order of skills.

The high order of skills are more required, though, in terms of investment decisions and things of that kind. So to apportion a substantial portion of that to that process appears to the court to be non founded in common sense.

There were other specific things that I think are of similar rationality as far as I view the overall record. If the Court feels it had an unjust enrichment kind of case, I think the Court would find the decision easy. But my perception is that I am locked in by a decision of the Supreme Court that simply found

it to be a pledge, and that those funds had to be accounted for to the customer. And it's that plain and simple, and it's put me in a tortuous kind of position that, notwithstanding my underlying biases and feelings, I feel that I have no choice.

I think there have been errors in both analyses in one way or another, but in thinking about it all, the court finds and concludes that the approach that Mr. Stewart took in his Schedule 7, which uses the short-term T-bill rate more closely approximates the short period of turnover with escrow accounts and the investment options. And the court finds it reasonable to conclude that on the Madsen account, during the period from March 3, 1971 through June 30, 1979, that there was total cumulative earnings on the Madsen account earned of $109.43. And that it would further be appropriate, as a finding, that as a matter of fact, that the Madsens would have a total cumulative effect of earnings on those funds bringing the total to $134.70.

MR. PALMER: $134.70?

THE COURT: Yes. Plaintiffs, accordingly, are awarded judgment for $134.70 plus allowable costs. And with respect to the mechanics, I haven't worked out anything with respect to the overall class impact it would have. So the issue of what the ramifications are

on a class basis are reserved for future consideration to be determined, with both of you to have an opportunity to review those matters as to how that should work out.

MR. PALMER: Could I inquire, when the Court says that if this were an unjust enrichment case, the decision would be easy, what the Court means by that?

THE COURT: I really -- my visceral reaction is that I don't feel there's unjust enrichment.

MR. DeBRY: Well, with that being said, however, in the context that in this case we didn't put on any evidence as to that.

THE COURT: I make no finding thereon. I'm being candid with both of you. It's a tortuous process for me. I think economic reality, considering all interests involved, even though corporations make profits and so forth, it bothers me, that bottom-line result, if I'm affirmed. But I think the evidence dictates that I must find otherwise.

MR. PALMER: All right. I anticipate, or I would have anticipated that regardless of which side prevails at this point, that there would be an appeal.

THE COURT: I certainly recognize that, and that's why I made the comments the second day, that the two experts perhaps could bring some reason and rationality to the thing, because of the enormous cost.

It's been a burdensomething and it's not easy for Mr. DeBry to carry the battle, and it's been a very costly one for him going forward, and a very costly process for Prudential to defend. And I sort of think that once this statute was amended to allow the customer the choice of one thing or the other, the battle, to a large measure, had been fairly won. But I don't think I have any choices.

From all of my rambling, Mr. DeBry, can you draft an intelligent set of findings, conclusions and whatever?

MR. DeBRY: Yes. Thank you.

THE COURT: Do you desire to make any further exceptions to my --

MR. DeBRY: No, your Honor.

THE COURT: -- my openness and candor?

MR. DeBRY: No.

MR. PALMER: Well, what I'm suggesting is that I expect that there will be an appeal before we get into the class issues, and I would anticipate findings and a judgment be presently entered in favor of Mr. Madsen.

MR. DeBRY: Well, perhaps that's a job for another day. We'll have to take your ruling and think about it and decide. We'll suggest to the Court what further steps are indicated.

THE COURT: Would you submit that to Mr. Palmer?

MR. DeBRY: Yes.

THE COURT: In advance, and allow me some leeway. I have got a month-long trial set for October, and so I'm going to be locked in to that time-wise. And if you've got objections or whatever, if we can get hearings early in the morning or late in the afternoon, I'll certainly be able to accommodate those kinds of things.

The reporter gets to go home at 5:00 on usual business, though I'll note for the record that it's now 5:58.

MR. DeBRY: We thank the Court and staff for your attention and the courtesies extended.

THE COURT: It's been a stimulating and challenging experience, but it really is not a very easy process, because it seems to me that the Court is in a position that clearly, in a case like that, you can't help but be damned if you do and damned if you don't, in either respect. And it's not a half-a-loaf kind of a case.

I realize that taking the lower figure of Mr. Stewart may appear to be that way, but I recognize that there are some reasonable areas that you could criticize maybe some of the assumptions he made, as well as those

of Mr. Norman.

We'll be in recess.

[Evening recess commencing at 5:58 p.m.]

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated,	:	MEMORANDUM DECISION
	:	CIVIL NO. 226073
vs.	:	
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, for itself and all others similarly situated,	:	
Defendant.	:	

This case comes before the Court as a class action brought by plaintiffs seeking to have Judgment against the defendant Prudential for interest on money held by Prudential in reserve accounts.

The case was tried before the Honorable Kenneth Rigtrup, District Judge, sitting without a jury. At the conclusion of the evidence and arguments of counsel, Judge Rigtrup commented from the bench on several subjects, and indicated his decision based upon the law and evidence.

Prior to the signing and filing of Findings of Fact, Conclusions of Law, and Judgment, the defendant Prudential moved to have Judge Rigtrup disqualified. Thereafter, the issue of Judge Rigtrup's disqualification was referred to this division of the Court for resolution.

Exhibit B

The plaintiffs have raised the issue of timeliness, claiming that defense counsel did not raise his objection to Judge Rigtrup hearing the case in a timely fashion. In reviewing the transcript of the proceedings before Judge Rigtrup on September 5, 1985, it is clear that Judge Rigtrup was about to rule, and that when Judge Rigtrup made his statements about being a former borrower of Prudential that insufficient notice was given to Prudential's counsel of this fact to allow counsel to confer with his client to determine the appropriate course of action.

The filing of an Affidavit of Prejudice against the judge before whom the client and attorney have a case pending is a serious matter and not one to be undertaken lightly, or without the client and the attorney conferring. In reviewing the transcript, this Court concludes that counsel for the defendant could not be expected to interrupt the proceedings to file an Affidavit of Prejudice. Therefore, the argument that the objection was not timely is without merit.

The next issue that must be addressed is whether the Judge in question was biased and prejudiced within the meaning of Rule 63 of the Utah Rules of Civil Procedure. The Utah Supreme Court in Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948) held that actual bias and prejudice on the part of a judge disqualifies that judge. The court stated:

> Bias and prejudice means a hostile feeling or spirit of ill will toward one of the litigants, or undue friendship or favoritism toward one. The fact that a judge may have an opinion as to the merits of the cause or that he has strong feelings about the type of litigation involved does not make him biased or prejudiced.

113 Utah at 20

There have been no subsequent cases cited to this Court concerning the meaning of the term "biased and prejudiced." This Court notes, however, that subsequent to Haslam, supra, Rule 63 of the Utah Rules of Civil Procedure was adopted by the Supreme Court of this state. More importantly, in 1974 the Utah Supreme Court approved the Code of Judicial Conduct. Canon 3(c) provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

This Court concludes that the impartiality of Judge Rigtrup might be reasonably questioned, and therefore Judge Rigtrup should have disqualified himself from hearing the issues raised in this case.

It is disputed as to whether or not Judge Rigtrup would be a member of a potential class of individuals who may or may not have causes of action against Prudential. Although Judge Rigtrup is not a party to this litigation, it is conceivable that his rulings could be binding upon Prudential in other similar litigation in which Judge Rigtrup could be a plaintiff on a

theory of collateral estoppel. He may therefore have a financial interest which would be substantially affected by the outcome of the proceeding as defined under Canon 3(c)(1)(c).

The litigants in this action have raised the issue of remittal of disqualification as defined under Canon 3(d). The Court has reviewed the Affidavits on file, which are conflicting. A remittal of disqualification is in effect an affirmative defense to the Motion to Disqualify a sitting judge. In reviewing the record, the Court can find nothing which persuades it by a preponderance of the evidence that there was a remittal of the disqualification.

The Court concludes that the overwhelming weight of authority is that the disqualification should be retroactive, and this Court so holds.

Lastly, this Court points out the advice of Justice Wade in Haslam, supra:

> One of the most important things in government is that all persons subject to its jurisdiction shall always be able to obtain a fair and impartial trial in all matters of litigation in its courts. It is nearly as important that the people have absolute confidence in the integrity of the courts. I can think of nothing that would as surely bring the courts into disrepute as for a judge to insist on trying a case where one of the litigants believes that such judge is biased and prejudiced against him.

113 Utah at 25.

Since no Findings of Fact, Conclusions of Law or Judgment have been entered in this case, and Judge Rigtrup has been disqualified, a new trial will be held before a Judge to whom the case will be assigned. This assignment will be made known to the lawyers and litigants by way of a Minute Entry which will follow shortly.

Dated this 16th day of January, 1986.

PHILIP R. FISHLER
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
CLERK
By K Gonzales
Deputy Clerk

Robert J. Debry
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

Attorney for the Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated,	:	ORDER
Plaintiffs,	:	
vs.	:	Civil Nos. 226073 & 798404
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, for itself and all others similarly situated,	:	Judge Philip R. Fishler
Defendant.	:	
UTAH BANKERS ASSOCIATION.	:	

* * *

Prudential Federal Savings & Loan's Motion to Disqualify the Honorable Kenneth R. Rigtrup, having come on for hearing, the Court having heard evidence, considered the memoranda on file, and being fully advised of the premisis, it is hereby ordered, adjudged and decreed that Judge Rigtrup be and he is hereby disqualified;

And further that all prior rulings of Judge Rigtrup be and the same are hereby set aside on the ground and for the reason that although there is no actual bias on the part of Judge Rigtrup,

Exhibit C

there is an appearance of bias as set forth in the Memorandum Decision heretofore filed by this Court.

DATED this 24th day of February, 1986.

BY THE COURT:

Philip R. Fishler
District Judge (Presiding)

FILMED

FILED IN SALT LAKE COUNTY
JAN 13 2 03 PM '77
W. STERLING EVANS, CLERK
3RD DIST COURT
BY [illegible] DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo0ooo---

RICHARD MADSEN and NANCY MADSEN, his wife, Plaintiffs,	
-vs-	ORDER
PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant.	Civil No. 226073

---ooo0ooo---

The motion of the named plaintiffs for a determination that this action be maintained as a class action having come on to be heard, and the same having been duly considered by the Court after presentation of briefs and oral arguments by the parties,

IT IS ORDERED, that the motion be and is hereby granted, and that this action shall be maintained as a class action pursuant to the provisions of Rule 23(a) and 23(b)(1)(A) of the Utah Rules of Civil Procedure.

IT IS FURTHER ORDERED, that the class represented by the named plaintiffs be and it is hereby certified as all persons who are presently parties to trust deed contracts with defendant wherein the contract provides that:

> "In addition to the monthly payments as provided in said note, the trustor agrees to pay to the beneficiary, upon the same day each month, budget payments estimated to equal one-twelfth of the annual taxes and insurance premiums; said budget payments to be adjusted from time to time as required, and said budget payments are hereby pledged to the beneficiary as additional security for the full performance of this deed of trust and the note secured thereby. The budget payments so accumulated may be withdrawn by the beneficiary for the payment of taxes or insurance premiums due

Exhibit D

on the premises. The beneficiary may at any time, without notice, apply said budget payments to the payments of any sums due under the terms of this deed of trust and the note secured hereby or either of them. Trustors failure to pay said budget payments shall constitute a default under this trust."

IT IS FURTHER ORDERED, that this class is maintained for the purpose of further proceedings to determine whether or not profits were derived from the use of the "budget payments" and, if so, to require an accounting for them to the plaintiffs. The maintenance of the class action shall be conditional upon the determination after a trial upon the merits that the defendant, by the use, if any, of the funds in plaintiffs' reserve account derived a profit from such use for which it must account to plaintiffs under the decision of the Supreme Court of Utah filed January 14, 1977 in this case.

DATED this 13 day of July, 1977.

BY THE COURT:

ATTEST
W. STERLING EVANS
CLERK
BY Deputy Clerk

Bryant H. Croft
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order for the Judge's signature was served upon Joseph J. Palmer, Esq., attorney for defendant, 600 Deseret Plaza 15 East First South, Salt Lake City, Utah 84111, by U. S. mail, postage prepaid, this 7th day of July, 1977.

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JUL 15 1958 2:11

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VA Form VB4-6LC (Home Loan) July 1958. Use Optional. Authorized by the Veterans' Administrator (38 U. S. C. A. 694 (d)). Acceptable to Federal National Mortgage Association.

UTAH

6 10 609

MORTGAGE

THIS MORTGAGE made this 3rd day of July nineteen hundred and fifty-eight between

Kenneth Rigtrup, an unmarried man

of Salt Lake, County of Salt Lake, and State of Utah, Mortgagor, and

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION

a corporation organized and existing under the laws of the United States of America, Mortgagee.

WITNESSETH: THAT WHEREAS, the Mortgagor is indebted to the Mortgagee in the principal sum of ELEVEN THOUSAND NINE HUNDRED AND NO/100 - - - - - - - - - - Dollars ($ 11,900.00), as evidenced by a promissory note, bearing even date herewith, for the payment of said principal sum, with interest thereon at the rate of four three fourths per centum (4-3/4%) per annum until paid; both principal sum and the interest thereon being payable in monthly installments at the times and in the amounts as set forth in said promissory note, reference to which is here made, at the office of the Mortgagee in Salt Lake

or at such other place as the holder may designate in writing delivered or mailed to the Mortgagor, the final installment, if not sooner paid, to be due and payable on the first day of , 19

NOW THEREFORE, for the purpose of securing prompt payment of said note, the Mortgagor, for valuable consideration, receipt of which is hereby acknowledged, does hereby mortgage, convey, assign, and warrant unto the Mortgagee, the following-described property, situated in Salt Lake County of Salt Lake, and State of Utah:

Lot 28, East Millbrook Subdivision, according to the plat thereof, recorded in the office of the County Recorder of said County.

together with all water rights, rights of way, easements, tenements, hereditaments and appurtenances thereunto belonging, or in anywise now or hereafter appertaining and all rents, issues and profits thereof (provided, however, that the Mortgagor shall be entitled to collect and retain the said rents, issues and profits until default hereunder), and all fixtures now or hereafter attached to or used in connection with the premises herein described; and in addition thereto the following described household appliances, which are, and shall be deemed to be, fixtures and a part of the realty, and are a portion of the security for the indebtedness herein mentioned:

The Mortgagor covenants and agrees with the Mortgagee as follows:

1. He will promptly pay the principal of and interest on the indebtedness evidenced by the said note, at the times and in the manner therein provided. Privilege is reserved to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or one hundred dollars ($100.00), whichever is less.

2. Together with, and in addition to, the monthly payments of principal and interest payable under the terms of the note secured hereby, the Mortgagor will pay to the Mortgagee, on the first day of each month until the said note is fully paid:

(a) A sum equal to the ground rents, if any, next due, plus the premiums that will next become due and payable on policies of fire and other hazard insurance covering the mortgaged property, plus taxes and assessments next due on the mortgaged property (all as estimated by the Mortgagee, and of which the Mortgagor is notified) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, taxes and assessments will become delinquent, such sums to be held by Mortgagee in trust to pay said ground rents, premiums, taxes and assessments, before the same become delinquent.

(b) The aggregate of the amounts payable pursuant to subparagraph (a) and those payable on the note secured hereby, shall be paid in a single payment each month, to be applied to the following items in the order stated:

(i) ground rents, taxes, assessments, fire and other hazard insurance premiums;
(ii) interest on the indebtedness secured hereby; and
(iii) amortization of the principal of said indebtedness.

Any deficiency in the amount of any such aggregate monthly payment shall, unless made good by the Mortgagor prior to the due date of the next such payment, constitute an event of default under this mortgage. At Mortgagee's option, Mortgagor will pay a "late charge" not exceeding four per centum (4%) of any installment when paid more than fifteen (15) days after the due date thereof to cover the extra expense involved in handling delinquent payments, but such "late charge" shall not be payable out of the proceeds of any sale made to satisfy the indebtedness secured hereby, unless such proceeds are sufficient to discharge the entire indebtedness and all proper costs and expenses secured thereby.

3. If the total of the payments made by the Mortgagor under (a) of paragraph 2 preceding shall exceed the amount of payments actually made by the Mortgagee for ground rents, taxes and assessments, or insurance premiums, as the case may be, such excess shall be credited on subsequent payments to be made by the Mortgagor for such items. If, however, such monthly payments shall not be sufficient to pay such items when the same shall become due and payable, then the Mortgagor shall pay to the Mortgagee any amount necessary to make up the deficiency within thirty (30) days after written notice from the Mortgagee stating the amount of the deficiency, which notice may be given by mail. If at any time the Mortgagor shall tender to the Mortgagee, in accordance with the provisions of the note secured hereby, full payment of the entire indebtedness represented thereby, the Mortgagee shall, in computing the amount of such indebtedness, credit to the account of the Mortgagor any credit balance accumulated under the provisions of (a) of paragraph 2 hereof. If there shall be a default under any of the provisions of this mortgage resulting in a public sale of the premises covered hereby, or if the Mortgagee acquires the property otherwise after default, the Mortgagee shall apply, at the time of the commencement of such proceedings, or at the time the property is otherwise acquired, the amount then remaining to the credit of Mortgagor under (a) of paragraph 2 preceding, as a credit on the interest accrued and unpaid and the balance to the principal then remaining unpaid on said note.

4. The lien of this instrument shall remain in full force and effect during any postponement or extension of the time of payment of the indebtedness or any part thereof secured hereby.

5. Mortgagor is lawfully seized of said premises in fee simple (or such other estate as is stated herein), and has good right to mortgage, sell, and convey the same, and will warrant and defend the same against all lawful claims and demands whatsoever. This mortgage is a first lien on said property.

6. Mortgagor will pay all ground rents, taxes, assessments, water rates, and other governmental or municipal charges, fines or impositions for which provision is made hereinabove, and in default thereof Mortgagee may pay the same, and Mortgagor will promptly deliver the official receipts therefor to the Mortgagee.

7. Mortgagor shall not commit or permit waste; and shall maintain the property in as good condition as at present, reasonable wear and tear excepted. Upon any failure to so maintain, Mortgagee, at its option, may cause reasonable maintenance work to be performed at the cost of Mortgagor.

8. Mortgagor will continuously maintain hazard insurance, of such type or types and amounts as Mortgagee may from time to time require, on the improvements now or hereafter on said premises, and except when payment for all such premiums has theretofore been made under (a) of paragraph 2 hereof, he will pay promptly when due any premiums therefor. All insurance shall be carried in companies approved by the Mortgagee and the policies and renewals thereof shall be held by it and have attached thereto loss payable clauses in favor of and in form acceptable to the Mortgagee. In event of loss he will give immediate notice by mail to the Mortgagee, who may make proof of loss if not made promptly by the Mortgagor. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to the Mortgagee instead of to the Mortgagor and the Mortgagee jointly. The insurance proceeds, or any part thereof, may be applied by the Mortgagee, at its option, either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In event of foreclosure of this mortgage, or other transfer of title to the mortgaged property in extinguishment of the debt secured hereby, all right, title and interest of the Mortgagor in and to any insurance policies then in force shall pass to the purchaser or grantee.

9. Mortgagee may perform any defaulted covenant or agreement of Mortgagor to such extent as Mortgagee shall determine, and any moneys advanced by Mortgagee for such purposes shall bear interest at the rate provided for in the principal indebtedness, shall thereupon become a part of the indebtedness secured by this instrument, ratably and on a parity with all other indebtedness secured thereby, and shall be payable thirty (30) days after demand.

10. Upon the request of the Mortgagee, the Mortgagor shall execute and deliver a supplemental note or notes for the sum or sums advanced by the Mortgagee for the alteration, modernization or improvement made at the Mortgagor's request; or for maintenance of said premises or taxes or assessments against the same and for any other purpose elsewhere authorized hereunder. Said note or notes shall be secured hereby on a parity with and as fully as if the advance evidenced thereby were included in the note first described above. Said supplemental note or notes shall bear interest at the rate provided for in the principal indebtedness and shall be payable in approximately equal monthly payments for such period as may be agreed upon by the creditor and debtor. Failing to agree on the maturity, the whole of the sum or sums so advanced shall be due and payable thirty (30) days after demand by the creditor. In no event shall the maturity extend beyond the ultimate maturity of the note first described above.

11. Upon a default in the payment of any indebtedness hereby secured or in the performance of any of the terms or conditions hereof, the Mortgagee may declare the entire indebtedness due and foreclose this mortgage, and may enter upon the property, collect all rents, income, and profits thereof.

12. If suit is brought to enforce the collection of the debt secured hereby, the court may appoint a receiver of the mortgaged premises pending foreclosure and redemption.

13. Mortgagor will pay all costs, and expenses, including reasonable attorney's fees, reasonably incurred by the Mortgagee, because of the failure on the part of the Mortgagor to perform his obligation under said promissory note and this mortgage, or either.

14. If the indebtedness secured hereby be guaranteed or insured under the Servicemen's Readjustment Act, as amended, such Act and Regulations issued thereunder and in effect on the date hereof shall govern the rights, duties and liabilities of the parties hereto, and any provisions of this or other instruments executed in connection with said indebtedness which are inconsistent with said Act or Regulations are hereby amended to conform thereto.

The covenants herein contained shall bind, and the benefits and advantages shall inure to, the respective heirs, executors, administrators, successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, the use of any gender shall include all genders, and the term "Mortgagee" shall include any payee of the indebtedness hereby secured or any transferee thereof whether by operation of law or otherwise.

WITNESS the hand and seal of the Mortgagor the day and year first above written.

Signed in the presence of—

Kenneth Pigtrup

STATE OF UTAH,
COUNTY OF Salt Lake } ss:

On the 3rd day of July, A. D. 19 58, personally appeared before me Kenneth Pigtrip, an unmarried man, the signer(s) of the above instrument, who duly acknowledged to me that he executed the same.

Robert K. Parker
Notary Public, residing at
Salt Lake City, Utah

My commission expires March 31 1962

STATE OF UTAH

Mortgage

TO

Dated , 19 .

Recorded at the request of—

, A. D. 19 .

at M., in Book of Mortgages, page , records of County, Utah.

Recorder.

Deputy.

WHEN RECORDED SEND TO:

PAID IN FULL 12-14-83 JC

KENNETH OR SUSANNE RIGTRUP
1967 East Mill brook Road
Salt Lake City, Utah 84105

THIS SPACE FOR RECORDING DATA

L.N. 003-3004480

3891439

SATISFACTION OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS: That the PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation organized and existing under the laws of the United States, does hereby certify and declare that a certain mortgage executed on JULY 3, 1958 by KENNETH RIGTRUP, an unmarried man

to PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, and recorded in the official records of the Recorder of Salt Lake County, State of Utah on July 15, 1958 as Document Number 1501111, Book 1522 Page 161, relating to the following described real property situate in Salt Lake County, State of Utah, is fully paid, satisfied and discharged:

Lot 28, EAST MILLCREEK SUBDIVISION, according to the plat thereof, recorded in the office of the County Recorer of said County.

5th

Wayne Harper

Prudential Federal Saving & Loan

FEE OF DEP

JAN 11 11 20 AM '84

KATIE L. DIXON
RECORDER
SALT LAKE COUNTY,
UTAH

BOOK 5522 PAGE 1376

IN WITNESS WHEREOF, the PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION has caused these presents to be executed by its duly authorized officer on December 19, 1983

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION

By A. Brad Slack

Title LOAN SERVICING OFFICER

STATE OF UTAH
COUNTY OF SALT LAKE } ss.

On December 19, 1983, before me, personally appeared A. BRAD SLACK, known to me to be the LOAN SERVICING OFFICER of the corporation that executed the within instrument, who being by me duly sworn, did say that he is said officer of the PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, that the seal affixed to said instrument is the corporate seal of said corporation, that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors and he acknowledged to me that said corporation executed the same.

Lorraine H. Huber

Notary Public in and for the State of Utah
Residing at SALT LAKE CITY, UTAH
My Commission Expires SEPTEMBER 17, 1986

Section 13. [Judicial Conduct Commission.]

A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:

(1) action which constitutes willful misconduct in office;

(2) final conviction of a crime punishable as a felony under state or federal law;

(3) willful and persistent failure to perform judicial duties;

(4) disability that seriously interferes with the performance of judicial duties; or

(5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the supreme court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the supreme court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order. The legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission.

Exhibit 7

78-7-1. Disqualification for interest or relation to parties.

Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

(1) To which he is a party, or in which he is interested.

(2) When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of the common law.

(3) When he has been attorney or counsel for either party in the action or proceeding.

But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court.

Exhibit G

Rule 63. Disability or Disqualification of a Judge.

(a) *Disability* If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties, but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(b) *Disqualification.* Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit, and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith

Exhibit H

Joseph J. Palmer (#2505) and
Reid E. Lewis (#1951), of
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111
Telephone: (801) 521-0250

Attorneys for Prudential Federal Savings & Loan Association

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated, Plaintiffs, vs. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, for itself and all others similarly situated, Defendant. UTAH BANKERS ASSOCIATION.	AFFIDAVIT OF JOHN A. ADAMS Civil No. 226073 ("Madsen I") Judge Kenneth Rigtrup

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

John A. Adams, being duly sworn, deposes and says:

1. I am Senior Vice President of Prudential Federal Savings & Loan Association, the defendant in this action.

Exhibit F

2. This action was tried by the Honorable Kenneth Rigtrup on September 4, 5 and 6, 1985. I was present in court each day of the trial.

3. I was present in court on Friday, September 6, 1985, when Judge Rigtrup, immediately after the close of the trial, made the remarks set forth in paragraph 12 of the Affidavit of Disqualification.

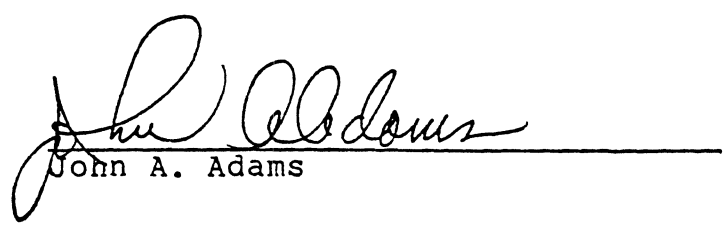
4. The conversation described in paragraph 12 of the Affidavit of Disqualification, and in Exhibit No. 1 of the Affidavit, accurately reflects the statements made by Judge Rigtrup and by Joseph Palmer during the proceedings.

5. Until I heard Judge Rigtrup's statements in court on September 6, 1985, I had never been told by anyone nor did I know that Judge Rigtrup had a mortgage with Prudential.

6. I have access to the mortgage files maintained by Prudential. There are approximately in excess of 18,000 mortgages now held by Prudential.

7. After hearing Judge Rigtrup's comments, I researched the Prudential records and found the mortgage file for him. The mortgage instrument between Judge Rigtrup and Prudential was originally executed on July 3, 1958. It required Judge Rigtrup to pay funds each month into a reserve account. The underlying loan was completely paid by Judge Rigtrup on approximately December 14, 1983.

DATED this 21st day of October, 1985.



John A. Adams

On this 21st day of October, 1985, personally appeared before me John A. Adams, the signer of the Affidavit who duly acknowledged to me that he executed it.

Stacie Pugh
NOTARY PUBLIC
Residing in: Salt Lake City, Utah

My Commission Expires:
Feb. 10, 1988

Salt Lake City, Utah

JAN 16 1986

H. Dixon Hindley, Clerk 3rd Dist. Court

By R Morelos

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

DEC 26 4 38 PM '85

H. DIXON HINDLEY CLERK
3rd DIST. COURT

BY _____ DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated, Plaintiffs, vs. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, for itself and all others similarly situated, Defendant. UTAH BANKERS ASSOCIATION	AFFIDAVIT OF STEPHEN T. HARD Civil No 226073

Stephen T. Hard, being first duly sworn upon oath, deposes and states as follows:

1. I am an associate attorney in the law firm of Giauque & Williams.

2. From approximately December, 1980 to July, 1983, Richard W. Giauque and I were counsel of record for Western Savings & Loan Company in the matters of Everill v. Western Savings & Loan Company, Civil No. 79-701, ("Everill") and Petty v. Western Savings & Loan Company, Civil No. 79-700 ("Petty").

3. A number of the "interest-on-reserve account" cases, including the Everill and Petty cases, were consolidated before the Honorable Kenneth Rigtrup.

Exhibit J

4. I recall that at some point in the proceedings over which he presided, Judge Rigtrup indicated that he had an old, low-interest mortgage loan which contained a reserve account clause. He further indicated that he would be able to rule objectively in these matters despite that fact. I recall that he asked if anyone had any objections to his sitting on these cases. I do not recollect anyone so objecting.

DATED this 20th day of December, 1985.

Stephen T. Hard

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On this 20th day of December, 1985, personally appeared before me Stephen T. Hard, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC
Residing at: SLC, Utah

My Commission Expires:
8-16-88

0586p

Hand delivered

CERTIFICATE OF ~~MAILING~~

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF STEPHEN T. HARD (Madsen vs. Prudential Utah Bankers Association) was MAILED, U.S. MAIL, ~~postage prepaid~~ Hand delivered, this 26 day of Dec, 1985, to the following:

Joseph J. Palmer, Esq.
Reid E. Lewis
MOYLE & DRAPER, P.C.
600 Deseret Plaza
Salt Lake City, Utah 84111

Peter W. Billings
FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, Utah 84111

R D

CODE OF JUDICIAL CONDUCT

Approved by the Supreme Court of Utah, March 1, 1974

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider **ex parte** or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilites of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If based on such dis-

closure, the parties and lawyers, independently of the judge's participation, all agree that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Practice of Law. A judge should not practice law.

F. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

AETNA LIFE INSURANCE CO., Appellant

v.

Margaret W. LAVOIE and Roger J. Lavoie, Sr.

No. 84-1601.

April 22, 1986.

Action was brought charging health insurer with bad faith refusal to pay claim. After two remands, 374 So.2d 310, 405 So.2d 17, the Circuit Court, Mobile County, Michael E. Zoghby, J., rendered judgment on jury verdict for insured for compensatory and punitive damages, and insurer appealed. The Alabama Supreme Court, 410 So.2d 1060, affirmed, and insurer appealed. The Supreme Court, Chief Justice Burger, held that: (1) Court had jurisdiction; (2) Alabama Supreme Court Justice's general frustration with insurance companies that were dilatory in paying claims did not reveal bias requiring disqualification under due process clause; (3) Justice's participation in case violated insurer's due process rights; (4) there was no basis for concluding that other Justices were disqualified; and (5) appearance of justice would be best served by vacating decision and remanding for further proceedings.

Vacated and remanded.

Justice Brennan filed concurring opinion.

Justice Blackmun filed opinion concurring in judgment in which Justice Marshall joined.

Justice Stevens did not participate.

1. Federal Courts ⇐504

Supreme Court had jurisdiction over question of whether Alabama Supreme Court Justice's participation in case violated insurer's rights under due process clause of Fourteenth Amendment [U.S.C.A. Const.Amend. 14], where Alabama Supreme Court's order denying recusal motions clearly demonstrated court reached merits of insurer's constitutional challenge, and insurer raised this issue as soon as it discovered facts relating to Justice's state actions against insurance companies alleging bad-faith failure to pay claims.

2. Judges ⇐49(1)

Only in most extreme cases of bias or prejudice is disqualification of judge constitutionally required.

3. Constitutional Law ⇐316

Alabama Supreme Court Justice's general frustration with insurance companies that were dilatory in paying claims did not reveal bias requiring disqualification under due process clause [U.S.C.A. Const.Amend. 14].

4. Constitutional Law ⇐316

Insurer's rights under due process clause of Fourteenth Amendment [U.S.C.A. Const.Amend. 14] were violated by Justice's participation in action seeking punitive damages for insurer's alleged bad-faith refusal to pay valid claim, where Justice, at time he cast deciding vote and authored court's opinion, had pending at least one very similar bad faith refusal-to-pay lawsuit against an insurer in another state court.

5. Judges ⇐42

While Alabama Supreme Court Justices might conceivably have had slight pecuniary interest in action against insurer seeking punitive damages for bad-faith refusal to pay valid claim because of their possible inclusion in other Justices' class action against another insurer alleging bad faith, that interest was not direct, personal, substantial and pecuniary, as required to disqualify such judges.

6. Federal Courts ⇐513

Upon determining that Alabama Supreme Court Justice was disqualified from participation in case, appearance of justice would be best served by vacating decision and remanding for further proceedings,

where Justice cast deciding vote and authored court's opinion.

Theodore B. Olson, Washington, D.C., for appellant.

Jack N. Goodman, Washington, D.C., for appellees.

Syllabus *

When appellant insurer refused to pay the full amount of a hospital bill incurred by appellees, they brought suit in an Alabama state court, seeking both payment of the full amount and punitive damages for appellant's alleged bad-faith refusal to pay a valid claim. The jury awarded $3.5 million in punitive damages. The Alabama Supreme Court affirmed, 5-to-4, in a *per curiam* opinion written by Justice Embry. Appellant then filed an application for rehearing, and, before the application was acted on, learned that while the case was pending before the Alabama Supreme Court, Justice Embry had filed two actions in an Alabama court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages. One of the actions was a class action on behalf of all state employees insured under a group plan by the Blue Cross-Blue Shield. Appellant then filed motions challenging, on due process grounds, Justice Embry's participation in the *per curiam* decision and his continued participation in considering the rehearing application, and also alleging that all justices on the court should recuse themselves because of their interests as potential class members in the Blue Cross suit. The court denied these motions, and also the rehearing application. Subsequently, the Blue Cross suit was settled, and Justice Embry received $30,000 under that settlement.

Held:

1. This Court has jurisdiction over the question whether Justice Embry's participation in this case violated appellant's rights under the Due Process Clause of the Fourteenth Amendment, where the Alabama Supreme Court's order denying the recusal motions clearly demonstrated that the court reached the merits of appellant's constitutional challenge, and where appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. P. 1584.

2. Appellant's allegations, on a general basis, of Justice Embry's bias and prejudice against insurance companies that were dilatory in paying claims, were insufficient to establish any constitutional violation. Pp. 1584–1585.

3. The record, however, presents more than mere allegations of bias and prejudice, and supports the conclusion that Justice Embry's participation in this case violated appellant's due process rights. All of the issues in this case were present in his Blue Cross suit, and the very nature of that suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that Blue Cross refused to pay before gaining punitive damages. Moreover, the affirmance in this case of the largest punitive damages award ever issued in Alabama on precisely the type of claim raised in the Blue Cross suit "raised the stakes" for Blue Cross in that suit to Justice Embry's benefit. Thus, his opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. When he made the judgment in this case, he acted as "a judge in his own case." His interest in this case was "direct, personal, substantial, [and] pecuniary," *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972), as shown by the sum he received in settlement of the Blue Cross suit. Pp. 1585–1587.

4. There is no basis for concluding that the justices of the Alabama Supreme

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Court other than Justice Embry were disqualified under the Due Process Clause. While those justices might conceivably have had a slight pecuniary interest in this case because of their possible inclusion in the Blue Cross class action, that interest cannot properly be characterized as "direct, personal, substantial, [and] pecuniary." Any interest that they might have had when they passed on the rehearing application was highly speculative and contingent, since at that time the trial court in the Blue Cross suit had not even certified a class, let alone awarded any class relief of a pecuniary nature. Pp. 1587–1588.

5. Because of Justice Embry's leading role in the decision under review, the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Pp. 1588–1589.

470 So.2d 1060 (Ala.1984), vacated and remanded.

BURGER, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. STEVENS, J., took no part in the consideration or decision of the case.

Chief Justice BURGER delivered the opinion of the Court.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case.

I

This appeal arises out of litigation concerning an insurance policy issued by appellant covering appellees Margaret and Roger Lavoie. In January 1977, Mrs. Lavoie was examined by her physician, Dr. Douglas, because of various ailments. Shortly thereafter, on Dr. Douglas' recommendation, she was admitted to the Mobile Infirmary Hospital, where she remained for 23 days for a battery of tests.

After her discharge, the hospital forwarded the appropriate forms and medical records along with a bill for $3,028.25 to appellant's local office in Mobile, Alabama. The local office refused to pay the entire amount, tendering payment for only $1,650.22. The local office also sent a letter to the national office, concluding that the 23-day hospitalization was unnecessary and that "[h]ospital records do not indicate anything to the contrary," even though all the hospital records had not yet been received. At one point, the national office told the local office to continue denying the request for full payment, but added that "if they act like they are going to file suit," the file should be reviewed.

Appellees filed suit against appellant, seeking both payment of the remainder of their original claim and punitive damages for the tort of bad faith refusal to pay a valid claim. The trial court dismissed for failure to state a cause of action with respect to the bad faith counts. Appellees appealed to the Alabama Supreme Court, which remanded on the ground that it had "not foreclosed the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits due under an insurance policy." *Lavoie v. Aetna Life & Casualty Co.*, 374 So.2d 310, 312 (1979). On remand, the trial court entered judgment for appellees on the unpaid portion of their claim and granted summary judgment for appellant on the bad faith claim. The Alabama Supreme Court again reversed, explaining that on that same day it had "recognized the intentional tort of bad faith in first party insurance actions." *Lavoie v. Aetna Life & Casualty Co.*, 405 So.2d 17, 18 (1981) (citing *Chavers v. National Security Fire & Casualty Co.*, 405 So.2d 1 (Ala.1981)). On remand, appellees' bad faith claim was submitted to a jury. The jury awarded $3.5 million in punitive damages. The trial judge denied appellant's motion for judgment n.o.v. or, alternatively, for remittitur.

The Alabama Supreme Court affirmed the award in a 5-to-4 decision. 470 So.2d 1060 (1984). An unsigned *per curiam* opinion expressed the view of five justices that the evidence demonstrated that appellant had acted in bad faith. The court interpreted its prior opinions as not requiring dismissal of a bad-faith-refusal-to-pay claim even where a directed verdict against the insurer on the underlying claim was impossible. The opinion also clarified the issue of whether a bad faith suit could be maintained where the insurer had made a partial payment of the underlying claim. Although earlier opinions of the court had refused to allow bad faith suits in such circumstances, partial payment was not dispositive of the bad faith issue. The court also rejected appellant's argument that the punitive damages award was so excessive that it must be set aside.

Chief Justice Torbert, joined by Justice Beatty, dissented; Justice Maddox, joined by Justice Shores, also dissented, concluding that the case was controlled by the court's earlier decision in *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357 (1982), because there was an arguable reason for appellant's refusal to pay the claim.

The court's opinion was released on December 7, 1984; on December 21, 1984, appellant filed a timely application for rehearing. On February 14, 1985, before its application had been acted on, appellant learned that while the instant action was pending before the Alabama Supreme Court, Justice Embry, one of the five justices joining the *per curiam* opinion, had filed two actions in the Circuit Court for Jefferson County, Alabama, against insurance companies. Both of these actions alleged bad faith failure to pay a claim. One suit arose out of Maryland Casualty Company's alleged failure to pay for the loss of a valuable mink coat; the other suit, which Justice Embry brought on behalf of himself and as a representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama (including, apparently, all justices of the Alabama Supreme Court), alleged willful and intentional failure to withhold payment on valid claims. Both suits sought punitive damages.

On February 21, 1985, appellant filed two motions in the Alabama Supreme Court, challenging Justice Embry's participation in the court's December 7, 1984, decision and his continued participation in considering appellant's application for rehearing. The motion also alleged that all justices on the court should recuse themselves because of their interests as potential class members in Justice Embry's suit against Blue Cross. On March 8, 1985, the court unanimously denied the recusal motions. The brief order stated that each justice had voted individually on the matter of whether he should recuse himself and that each justice had voted not to do so. At the same time, by a 5-to-4 division, the court denied appellant's motion for rehearing.

Chief Justice Torbert wrote separately, explaining that although his views had not been influenced by his possible membership in the putative class alleged in Justice Embry's suit against Blue Cross, he was nonetheless notifying the Clerk of the court where that suit was pending not to permit him to be included in the alleged class. Justice Maddox also wrote separately, taking similar action.

On March 20, 1985, appellant obtained a copy of the transcript of Justice Embry's deposition, taken on January 10, 1985, in connection with his Blue Cross suit. The deposition revealed that Justice Embry had authored the *per curiam* opinion in this case over an 8- or 9-month period during which his civil action against Blue Cross was being prosecuted. Justice Embry also stated that, during that period, he had received "leads" from people with regard to his bad faith action against Blue Cross and that he put them in touch with his attorney. Finally, Justice Embry revealed frustration with insurance companies. For example, when asked if he had ever had any difficulty with processing claims, Justice Embry

retorted: "[T]hat is a silly question. For years and years."

Appellant moved for leave to file a second application for rehearing based on the deposition, but that motion was denied. Appellant filed an appeal with this Court, and Justice POWELL, as Circuit Justice, granted appellant's application for a stay of the judgment below pending this Court's disposition of the appeal. Shortly thereafter, Justice Embry's suit against Blue Cross was settled by stipulation of the parties.[1] In the stipulation, Blue Cross recognized "that some problems have occurred in the past and is determined to minimize them in the future." Justice Embry received $30,000 under the settlement agreement on a basic compensatory claim of unspecified amount; a check for that sum was deposited by his attorney directly into Justice Embry's personal account.

We postponed consideration of the question of jurisdiction pending argument on the merits. 471 U.S. ——, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985). We now vacate and remand.

II

[1] We are satisfied as to the Court's jurisdiction over the question of whether Justice Embry's participation violated appellant's Fourteenth Amendment due process rights. Appellees argue that the Alabama Supreme Court did not reach this issue because it was raised only after the court's decision on the merits. We reject that contention as at odds with the record. On March 8, 1985, the court entered the following order:

> "Upon consideration, the Court is of the opinion that under the allegation of said motion in this case each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each justice having voted not to recuse,
>
> "IT IS, THEREFORE, ORDERED that the 'Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo' be ... denied." App. to Juris. Statement 64a.

This order clearly demonstrates that the Alabama court reached the merits of appellant's constitutional challenge, albeit on a justice-by-justice basis. Moreover, appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. On this record, we conclude jurisdiction is proper. See *Ulster County Court v. Allen*, 442 U.S. 140, 147–154, 99 S.Ct. 2213, 2219–2223, 60 L.Ed.2d 777 (1979); *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972).

III

A

Appellant contends Justice Embry's general hostility towards insurance companies that were dilatory in paying claims, as expressed in his deposition, requires a conclusion that the Due Process Clause was violated by his participation in the disposition of this case. The Court has recognized that not "[a]ll questions of judicial qualification ... involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); see also *FTC v. Cement Institute*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948) ("most matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. See, *e.g.*, *Clyma v. Kennedy*, 64 Conn. 310, 29 A. 539 (1894). See generally Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947). As Black-

1. Justice Embry's suit against Maryland Casualty Company had been settled sometime earlier by the payment of Justice Embry's claim.

stone put it, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries *361. The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. See *Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("[A] judge should disqualify himself ... where he has a personal bias or prejudice concerning a party"). *But that alone would not be sufficient* basis for imposing a constitutional requirement under the Due Process Clause. We held in *Patterson v. New York*, 432 U.S. 197, 201–202, 97 S.Ct. 2319, 2322–2323, 53 L.Ed.2d 281 (1977) (citations omitted), that

> "it is normally within the power of the State to regulate procedures under which its laws are carried out ... and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

[2, 3] We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. *Certainly only in the most* extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level. Appellant suggests that Justice Embry's general frustration with insurance companies reveals a disqualifying bias, but it is likely that many claimants have developed hostile feelings from the frustration in awaiting settlement of insurance claims. Insurers, on their side, have no easy task, especially when trying to evaluate whether certain medical diagnostic tests or prolonged hospitalization were indicated. In turn, the physicians and surgeons, whether impelled by valid medical judgment or by apprehension as to future malpractice claims—or some combination of the two—similarly face difficult problems. Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.

B

The record in this case presents more than mere allegations of bias and prejudice, however. Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case. In *Tumey*, while recognizing that the Constitution *does not reach every issue of judicial qualification*, the Court concluded that "it certainly violates the Fourteenth Amendment ... to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S., at 523, 47 S.Ct., at 441.

More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S., at 60, 93 S.Ct., at 83.

[4] Under these prior holdings, we examine just what factors might constitute such an interest in the outcome of this case that would bear on recusal. At the time

Justice Embry cast the deciding vote and authored the court's opinion, he had pending at least one very similar bad faith refusal-to-pay lawsuit against Blue Cross in another Alabama court. The decisions of the court on which Justice Embry sat,[2] the Alabama Supreme Court, are binding on all Alabama courts. We need not blind ourselves to the fact that the law in the area of bad faith refusal-to-pay claims in Alabama, as in many other jurisdictions, was unsettled at that time, as the court's close division in deciding this case indicates. When Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law; the court's opinion does not suggest that its conclusion was compelled by earlier decisions. Instead, to decide the case the court stated "it is first necessary to review the policy considerations, elements, and instructive guide posts set out by this court in earlier case law." 470 So.2d, at 1070. And in another case the court acknowledged that "the tort of bad faith refusal to pay a valid insurance claim is in the embryonic stage, and the Court has not had occasion to address every issue that might arise in these cases." *National Savings Life Ins. Co. v. Dutton*, 419 So.2d, at 1362.

The decision under review firmly established that punitive damages could be obtained in Alabama in a situation where the insured's claim is not fully approved and only partial payment of the underlying claim had been made. Prior to the decision under review, the Alabama Supreme Court had not clearly recognized any claim for tortious injury in such circumstances; moreover, it had affirmatively recognized that partial payment was evidence of good faith on the part of the insurer. *Sexton v. Liberty National Life Ins. Co.*, 405 So.2d 18, 22 (1981). The Alabama court also held that a bad faith refusal-to-pay cause of action will lie in Alabama even where the insured is not entitled to a directed verdict on the underlying claim, a conclusion that at the least clarified the thrust of an earlier holding. Cf. *National Savings Life Insurance Co. v. Dutton, supra*, at 1362. Finally, the court refused to set aside as excessive a punitive damages award of $3.5 million. The largest punitive award previously affirmed by that court was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 926 (1981).

All of these issues were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

We need not decide whether to characterize the decision under review as a change in Alabama law or a clarification of the contours of that law, a judgment we are obviously not called on to make. We hold simply that when Justice Embry made that judgment, he acted as "a judge in his own case." *Murchison, supra*, 349 U.S., at 136, 75 S.Ct., at 625.

We also hold that his interest was " 'direct, personal, substantial, [and] pecuniary.' " *Ward*, 409 U.S., at 60, 93 S.Ct., at 83 (quoting *Tumey v. Ohio*, 273 U.S., at 523, 47 S.Ct., at 441). Justice Embry's complaint against Blue Cross sought "compensatory damage for breach of contract, inconvenience, emotional and mental dis-

2. Justice Embry has since retired from the court for health reasons.

tress, disappointment, pain and suffering" in addition to punitive damages for himself and for the class. Soon after the opinion of the Alabama Supreme Court in this case was announced, Blue Cross paid Justice Embry what he characterized in an interview as "a nice sum," Reply Brief for Appellant 10, n. 8, to settle the suit. Records lodged with this Court show that Justice Embry received $30,000, which was deposited by his attorney directly into Justice Embry's personal account. To be sure, a portion of this money may have gone to Justice Embry's attorney in connection with the case, even though some materials before us suggest that his attorney agreed to waive his fee. Deposition of A. Grey Till in *Clay v. Nationwide Insurance Co.*, CV-78-1148 (Cir.Ct. of Mobile Cty., Ala.), pp. 27-29. We are also aware that Justice Embry obtained a statement in the settlement agreement to the effect that "[t]he primary object of the institution of this suit ... was to emphasize to defendant Blue Cross ... that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner," even though that type of relief was not sought specifically in the complaint while monetary relief was. We nonetheless hold that the "nice sum" that Justice Embry received directly is sufficient to establish the substantiality of his interest here.

We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation ... to the average [judge] ... [to] lead him to not to hold the balance nice, clear and true." *Ward*, *supra*, 409 U.S., at 60, 93 S.Ct., at 83. The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S., at 136, 75 S.Ct., at 625 (citation omitted).

C

[5] Appellant has challenged not only the participation of Justice Embry in this case but also the participation of all the other justices of the Alabama Supreme Court, or at least the six justices who did not withdraw from Justice Embry's class action against Blue Cross, claiming that they also have an interest in this case. Such allegations do not constitute a sufficient basis for requiring recusal under the Constitution. In the first place, accepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a "rule of necessity" none of the judges or justices would be disqualified. See *United States v. Will*, 449 U.S. 200, 214, 101 S.Ct. 471, 480, 66 L.Ed.2d 392 (1980).

More important, while these justices might conceivably have had a slight pecuniary interest,[3] we find it impossible to char-

3. The Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), stated in dicta that "in *Tumey*, 273 U.S., at 524 [47 S.Ct., at 441], the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge...." *Id.*, 409 U.S., at 148, 89 S.Ct., at 339. We think this was a misreading of *Tumey*. The reference to "the slightest pecuniary interest" in that opinion came in a portion of the opinion describing "cases at common law in England prior to the separation of colonies from the mother country...." 273 U.S., at 524, 47 S.Ct., at 441. At a later point in the opinion, Chief Justice Taft quoted approvingly from the work of Justice Cooley, that disqualification is not worked in cases where the "'interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual.'" *Id.*, at 531, 47 S.Ct., at 444 (quoting T. Cooley, Constitutional Limitations 594 (7th ed. 1903)). Chief Justice Taft also reiterated that the case was not one "in which the penalties and the costs are negligible.... The court is a state agency, imposing substantial punishment.... It is not to be treated as a mere village tribunal

acterize that interest as " 'direct, personal, substantial, [and] pecuniary.' " *Ward, supra*, 409 U.S., at 60, 93 S.Ct., at 83 (quoting *Tumey, supra*, 273 U.S., at 523, 47 S.Ct., at 441). Appellant concedes that nothing in the record even suggests that these justices had any knowledge of the class action before the court issued a decision on the merits. Thus, at most only the decision to deny rehearing was even plausibly affected. Any interest that they might have had when they passed on the rehearing motion was clearly highly speculative and contingent. At the time, the trial court had not even certified a class, let alone awarded any class relief of a pecuniary nature. With the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation. Cf. *In re City of Houston*, 745 F.2d 925 (CA5 1984). At some point, "[t]he biasing influence ... [will be] too remote and insubstantial to violate the constitutional constraints." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.Ct. 1610, 1614, 64 L.Ed.2d 182 (1980). Charges of disqualification should not be made lightly. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). We hold that there is no basis for concluding these justices were disqualified under the Due Process Clause.

D

[6] Having concluded that only Justice Embry was disqualified from participation in this case, we turn to the issue of the proper remedy for this constitutional violation. Our prior decisions have not considered the question of whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. Rather, our prior cases have involved interpretations of statutes with provisions concerning this question, *e.g., Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), disqualifications of the sole member of a tribunal, *e.g., Ward v. Village of Monroeville, supra*, and disqualifications of an entire panel, *e.g., Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). Some courts have concluded that a decision need not be vacated where a disqualified judge's vote is mere surplusage. See, *e.g., State ex rel. Langer v. Kositzky*, 38 N.D. 616, 166 N.W. 534 (1918); but see, *e.g., Oakley v. Aspinwall*, 3 N.Y. 547 (1850).[4] But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision [5] and he was the author

for village peccadilloes." 273 U.S., at 532, 47 S.Ct., at 444. We therefore follow *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972), and decline to read *Tumey* as constitutionalizing any rule that a decision rendered by a judge with "the slightest pecuniary interest" constitutes a violation of the Due Process Clause.

4. We have confined the opinion to the issues presented by the parties and express no view on the question discussed by the Justices who write separately. The issues here are far more complex than acknowledged by the concurrences, which, reasoning from hypothetical situations on matters not presented by the facts of this case, postulate a broad general rule. Traditionally the Court does not undertake to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)). Because the issue of disqualification of a single member of a multimember panel arises in a variety of factual contexts, see generally C.J.S. Judges § 159, p. 868 (collecting cases), sound judicial practice wisely counsels judges to avoid unnecessary declarations on issues not presented, briefed, or argued.

5. If Justice Embry had disqualified himself, the decision of the trial court would not have been affirmed by a vote of an equally divided court. Rather, Ala.Code § 12-2-14 (1975), which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter, would presumably have come into play.

of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Appellees have not contended that, upon a finding of disqualification, this disposition is improper.

III

We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the States, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.

Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, Section 10; that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, appellant contends that Ala.Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed 10% penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

The judgment of the Supreme Court of Alabama is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Justice STEVENS took no part in the consideration or decision of this case.

Justice BRENNAN, concurring.

I agree with the Court that, given Justice Embry's interest in the outcome of this case, his participation in its disposition violated due process. As the Court notes, resolution of the issues raised in the appeal below enhanced the viability and settlement value of Justice Embry's own lawsuit. Such an interest clearly required recusal under our decisions in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); and *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). As Justice Black explained in *In re Murchison, supra:*

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U.S., at 136, 75 S.Ct., at 625.

I write separately to set forth my understanding of certain statements in the Court's opinion. *First*, the Court stresses that Justice Embry's interest was " 'direct, personal, substantial, [and] pecuniary.' " *Ante*, at 1586 (quoting *Ward*, *supra*, 409 U.S., at 60, 93 S.Ct., at 83); see also, *ante*, at 1588. I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due process. See, *e.g.*, *In re Murchison*, *supra* (judge who presided over a "one-man grand jury" also presided over contempt proceedings relating to events which took place in the grand jury proceedings). Moreover, as this case demonstrates, an interest is sufficiently "direct" if the outcome of the challenged pro-

ceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding. See, *e.g.*, *Ward v. Village of Monroeville*, *supra* (mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Gibson v. Berryhill*, *supra* (proceedings by Alabama Board of Optometry enjoined because Board members were competitors of petitioners and therefore stood to gain competitively). Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way. Rather, the Court clearly indicates the contrary in acknowledging that the interests which trigger due process condemnation "cannot be defined with precision." *Ante*, at 1585 (quoting *In re Murchison*, *supra*, 349 U.S., at 136, 75 S.Ct., at 625).

Second, the Court points out that Justice Embry obtained a favorable settlement in his own lawsuit several months after the Alabama Supreme Court handed down its decision in this case. But even without that settlement, Justice Embry's participation in this case deprived appellant of due process. The deprivation occurred when Justice Embry took part in the deliberations and decision of the Alabama Supreme Court in this case. At most—and, again, I do not read the Court's opinion to say otherwise—the fact of the later settlement merely confirms that Justice Embry had a substantial interest in the outcome of this case.

Finally, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant—Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Justice BLACKMUN, with whom Justice MARSHALL joins, concurring in the judgment.

I join the Court's judgment that Justice Embry's participation in this case denied appellant the impartial decisionmaker required by the Due Process Clause. I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.

The Court states that a decision cannot be permitted to stand "when a disqualified judge casts the deciding vote. Here, Justice Embry's vote was decisive in the five-to-four decision and he was the author of the court's opinion." *Ante*, at 1588–1589. In a footnote, the Court elaborates on the decisiveness of Justice Embry's vote: had he disqualified himself, the decision of the trial court would not have been affirmed by an equally divided court because, under

Alabama law, a special justice would have been appointed to break the tie. *Ante*, at 1589, n. 5.

The record, however, casts doubt upon the Court's suggestion that Justice Embry provided the most crucial vote. Justice Embry's deposition testimony in the Blue Cross suit suggests that the initial vote of the Alabama Supreme Court was in fact to reverse the decision of the trial court in favor of the Lavoies. Accordingly, Justice Embry began work on a dissent. App. to Juris. Statement 168a–169a. After Justice Embry began writing, however, at least one justice switched his vote. Justice Embry's proposed dissent ultimately was issued as the *per curiam* opinion of the court. He explained: "It's customary a lot of times [to issue an opinion as a *per curiam*], if it's been assigned to you because the other opinion didn't prevail...." *Id.*, at 167a.

We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case. But we do know, from our own experience on this 9-member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5–4 somehow plays a peculiarly decisive "leading role," *ante*, at 1589, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6–3, Aetna would somehow not have been injured by his participation.

More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.

The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events—that another justice switched his vote and that Justice Embry wrote the court's opinion—illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

UNITED STATES, Petitioner

v.

AMERICAN COLLEGE OF PHYSICIANS.

No. 84–1737.

Argued Jan. 21, 1986.

Decided April 22, 1986.

Tax-exempt medical organization fi suit for refund of taxes on income fr